U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: October 13, 1998
Case No. **98 INA 114**

In the Matter of:

CORATO CONTRACTING CORP. , *Employer,*

on behalf of

MANUEL JESUS SANCHEZ, *Alien.*

Appearance: Anita Delgado, Esq., of White Plains, New York, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MANUEL JESUS SANCHEZ ("Alien") by CORATO CONTRACTING CORP., ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at New York, New York, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On July 5, 1995, Employer applied for alien labor certification on behalf of the Alien for the position of "Maintenance Carpenter" on behalf of the Alien. AF 09.[2] The duties of the job were described as follows:

> Construct and repair structural woodwork and equipment in residences or businesses. Build, repair and install counters, cabinets, benches, partitions, floors, doors, and building framework, using manual and pwer-operated tools. Install glass, replace damaged ceiling and floor tile as well as wall coverings.

AF 09 (Quoted verbatim without change or correction.) The Employer did not specify any education, but required that applicants have four years of experience in the job Offered.[3] Although several of the twenty U. S. workers who were referred for the job were apparently qualified, the Employer did not hire any of them. AF 25-60.[4]

Notice of Findings. On May 28, 1997, the CO issued a Notice of Findings ("NOF")

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[2] The position was classified as Carpenter, Maintenance, under DOT Occupational Code No. 860.281-010 **CARPENTER, MAINTENANCE** (any industry) alternate titles: carpenter, repair. Constructs and repairs structural woodwork and equipment in establishment, working from blueprints, drawings, or oral instructions: Builds, repairs, and installs counters, cabinets, benches, partitions, floors, doors, building framework, and trim, using carpenter's handtools and power tools. Installs glass in windows, doors, and partitions. Replaces damaged ceiling tile, floor tile, and wall coverings. May build cabinets and other wooden equipment in carpenter shop, using woodworking machines, such as saws, shaper, and jointer [CABINETMAKER (woodworking) 660.280-010]. May install items, such as window shades, venetian blinds, and curtain rods, wall fans, and door locks for tenants. May be designated according to place at which work is performed as carpenter, Mine (mine & quarry); or according to specific items made or maintained as Flume Maker (mine & quarry); Frame Maker (leather mfg.); Meat-Cutting- Block Repairer (any industry). *GOE: 05.05.02 STRENGTH: M GED: R4 M4 L3 SVP: 7 DLU: 86*

[3] The work consisted of a 40 hour week with no overtime, from 7:30 A.M. to 4:30 P.M., for which the worker was to be paid wages at the rate of $18.88 per hour.

[4] The Alien was born in Ecuador on October 7, 1957. From June 1983 to October 1988 the Alien was self-employed as a carpenter in Ecuador. From March 1989 to May 1993 he was self-employed as a carpenter in Tarrytown, New York. AF 03-04 indicates that the work the Alien performed from 1983 to 1993 was substantially the same as the Job Duties in Employer's application. The Alien worked for the Employer in the Job Offered from January 1994 to the date of application.

proposing denial of certification. AF 61-63. Citing 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(ii), the CO said it appeared that qualified U. S. workers had been rejected for reasons that were neither lawful nor job-related. The NOF identified the following applicants as qualified for the job by reason of their resumes: Bova, Denet, Halpin, Ingardia, and Morra. Mr. Bova, Mr. Denet, and Mr. Ingardia said that they were neither contacted nor interviewed by the Employer. Mr. Morra said that, although he was contacted by the Employer, he was available to be hired and he was not offered the job. The Employer did not offer the position to Mr. Halpin for reasons that were not sufficient to justify his rejection. By way of rebuttal the NOF required Employer to prove (1) that it did, in fact, contact all of these applicants and (2) that its reasons for rejecting each of them were lawful and job-related under the Act and regulations. AF 61-62.

Rebuttal. On June 24, 1997, the Employer filed its rebuttal addressing the issues discussed in the NOF. AF 64-67. The rebuttal consisted of a certified mail receipt for a communication to Bova, and a written statement by the Employer's president.[5] AF 64-66. The Employer's statement repeated and added to the contents of its previous report concerning its recruitment efforts. AF 51-54.

Final Determination. The CO denied certification by the Final Determination issued July 18, 1997. AF 68-70. Again citing 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(ii), the CO observed that in the NOF the qualifications of five U. S. job applicants was discussed and the Employer was direct to document specific lawful, job-related reasons for rejecting them for the position offered in its application for alien labor certification under the Act and regulations. First, the CO found that the rebuttal provided job-related reasons for the rejection of Mr. Halpin and Mr. Morra. While noting that the NOF had expressly requested the filing of the green U. S. Post Office return receipt cards for all of the job applicants that the Employer alleged it had interviewed, however, the CO said the Employer failed to provide specific documentary evidence confirming that it had, in fact, contacted Bova, Denet, and Ingardia. In short, although the Employer proved that it sent letters to these three U. S. workers, failed to demonstrate that the letters ever arrived. In the absence of such evidence, the CO concluded that the Employer failed to sustain its burden of proof and denied certification for this reason.

Appeal. On August 22, 1997, the Employer requested administrative-judicial review of the denial of labor certification. AF 71-81. At that time the Employer offered new evidence, which is not a part of the Appellate File, to which the Board is limited in considering the appeal of the denial of certification in this case. 20 CFR §§ 656.26(b)(4) and 656.27(c); and see **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

Discussion

[5] Except for the Certified Mail receipt for Bova, the documents mentioned in Employer's statement were not made a part of the rebuttal. The Panel observes, however, that the Employer's certified mail receipts for communications to Bova, Denet, Halpin, Ingardia, and Morra were already in the record at AF 25-26.

In determining whether the Employer rejected qualified U. S. workers for reasons that were lawful and job-related, 20 CFR § 656.20(c)(8)[6] requires that the Employer establish that the position offered has been and is clearly open to any qualified U. S. worker; and 20 CFR §§ 656.21(b)(6) and 656.21(j)(1) provide that where U. S. workers have applied for the job, the employer must document that they were rejected solely for reasons that were lawful and job-related.[7]

In this case the issue turns on whether or not the Employer sustained the burden of proving that it contacted three U. S. applicants who were referred as apparently qualified for the Job Offered. The Employer's assertion that it sent letters to Bova, Denet, and Ingardia was contradicted by their separate responses to the questionnaires each of them received from the state employment security agency. After examining the Appellate File, including the NOF and the Employer's rebuttal, the Panel can find no evidence that the Employer complied with the NOF directions to establish that it contacted these three U. S. job applicants. Nothing of record suggests that the evidence that Employer's Certified Mail letters to these job applicants arrived was unavailable or impossible to acquire, or that it provided a reasonably credible equivalent of such Return Receipts, and the Employer did not offer to explain the absence of signed Certified Mail Return Receipts from these workers. **Anderson Typographics**, 90 INA 287 (Jun. 20, 1991). Since the Employer demonstrated in AF 25-26 that it sent letters to Bova, Denet, and Ingardia by Certified Mail, a negative inference is drawn from its failure to proffer the documents which it should have received from the U. S. Postal Service in the usual course of business to demonstrate that the letters actually arrived. It follows that the documentation of Employer's efforts to communicate with Bova, Denet, and Ingardia was incomplete and was not compelling proof that the Employer actually contacted these workers. Moreover, it is well established that where a CO has requested specific, relevant, and reasonably obtainable documentation of an employer's recruitment efforts, employer must produce such evidence. **Oconee Center, Mental Retardation Services**, 88 INA 040 (Jul. 5, 1988). Moreover, there is no evidence of record that suggests that the evidence Employer failed to file in the rebuttal was unavailable or impossible to acquire, or that it was, in fact, provided in some satisfactory form.

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[6] Although the words "*bona fide* job opportunity" do not appear in the regulations, 20 CFR § 656.20(c)(8) was interpreted as follows by the U. S. District Court in **Pasadena Typewriter and Adding Machine Co., Inc., and Alirez Rahmaty v. United States Department of Labor**, No. CV 83-5516-AABT, (C.D. Cal., 1987), "The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper."

[7] An employer has failed to specify a lawful job-related reason for rejecting the U. S. applicant when it fails to explain or document that job applicant's lack of qualifications. **Seaboard Farms of Athens, Inc.**, 90 INA 383 (Dec. 3, 1991); **Tulasi Polavarapu, M.D.**, 90 INA 333 (Oct. 29, 1991); **D& J Finishing, Inc.**, 90 INA 446 (Aug. 13, 1991); **Poquito Mas** 88 INA 486 (Feb. 26, 1990). An applicant usually be considered qualified for a job, if he meets the minimum requirement specified for the position in the labor certification application. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988). An employer's rejection was held to be unlawful where the U. S. worker satisfied the minimum requirements specified on the Form ETA 750A and in the advertisement for the position. **Banque Francaise du Commerce Exterieur**, 93-INA-44(Dec. 7, 1993); **American Cafe**, 90 INA 026 (Jan. 24, 1991); **Cal-Tex Management Services**, 88 INA 492 (Sept. 19, 1990); **Richco Management**, 88 INA 509 (Nov. 21, 1989).

It is well settled that certification may be denied when an employer fails to provide documentation that the CO reasonably requested. **Dr. and Mrs. Bernard Greenbaum**, 95 INA 142 (Mar. 27, 1997); **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995).

For these reasons, after examining the application, NOF, rebuttal, Final Determination, and the Employer's appeal, the Panel concludes that the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proof that its recruitment efforts were *bona fide*. **H. C. LaMarche Enterprises**, 87 INA 607 (Oct. 27, 1988). Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.